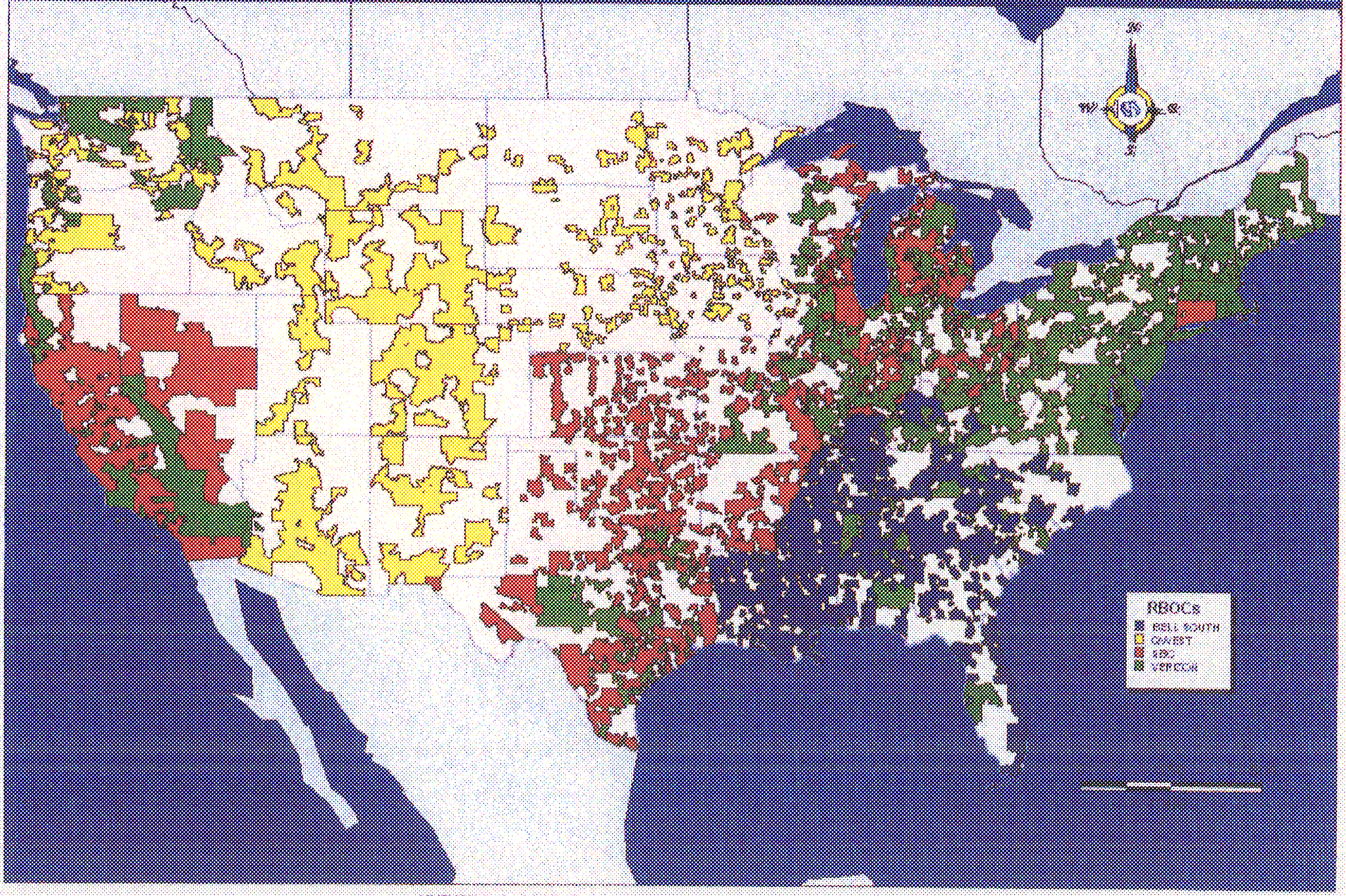
EXHIBIT D

RBOC Service Area Map

ACTUAL REGIONAL BELL OPERATING COMPANY (RBOC) AREAS



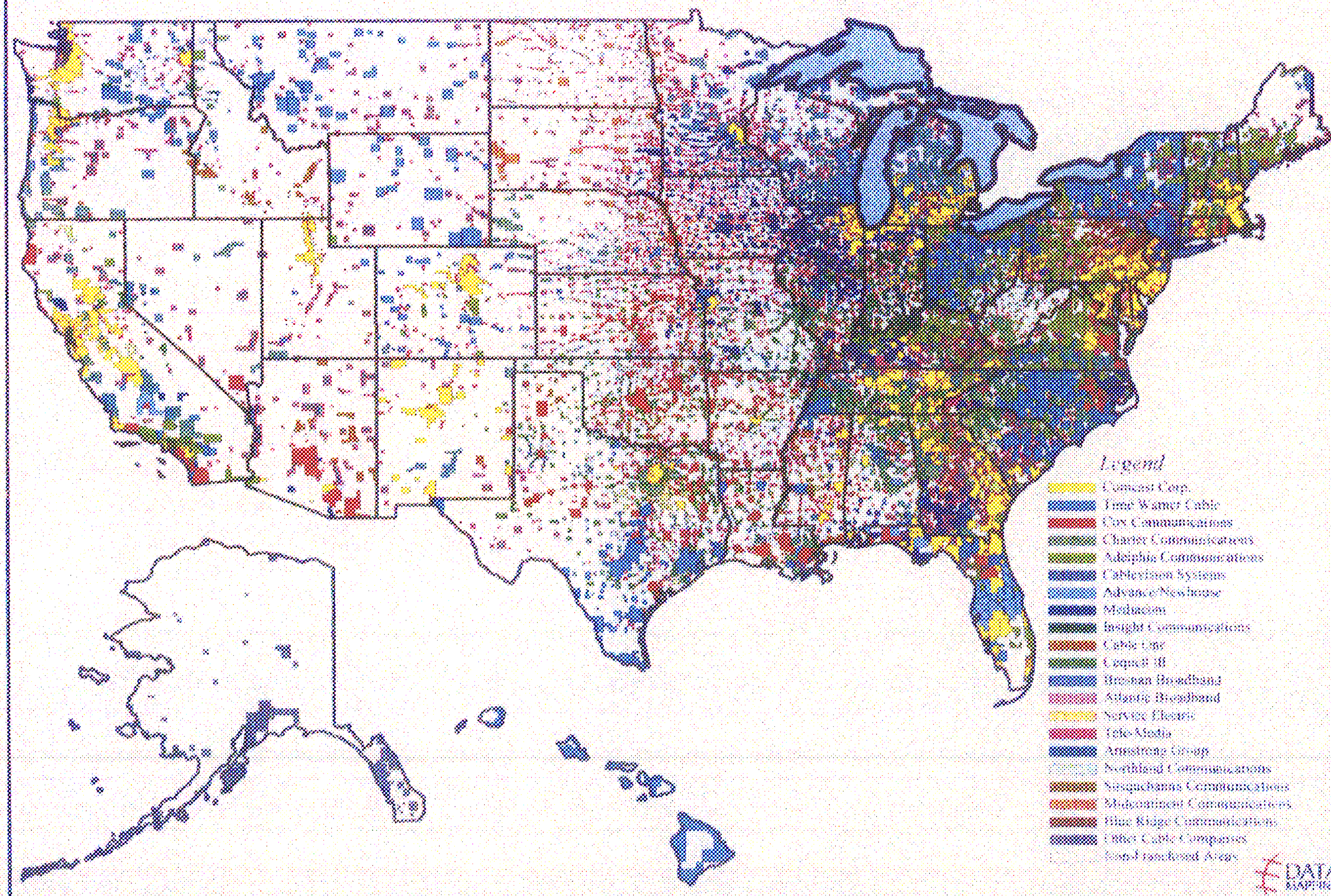
UNIVERSAL ACCESS PROPRIETARY AND CONFIDENTIAL INFORMATION

E

EXHIBIT E

Cable MSO Service Area Map

U. S. Cable Television Franchise Areas



F

EXHIBIT F

Comcast Attributable Subscribers
Pre- and Post-Transactions

COMCAST CORPORATION ATTRIBUTABLE SUBSCRIBERS

	ENTITY	OWNERSHIP*	OWNERSHIP %	SUBSCRIBERS[1]
Wholly Owned Systems	Comcast cable subsidiaries	**Various Comcast Subsidiaries**	100% interest	21,524,802
Attributable Systems	Clearview Partners	**Lenfest Clearview, Inc.** ClearviewCATV, Inc.	30% general partnership 70% general partnership	9,874
	Parnassos Communications, L.P.	**TCI Adelphia Holdings, LLC.** Adelphia Western New York Holdings, Inc. Montgomery Cablevision, Inc.	33.33% general 66.57% general 0.10% limited	416,260
	Century-TCI California Communications, L.P.	**TCI California Holdings, L.L.C.** Century Exchange, L.L.C.	25% limited 75% limited and general	665,878
	Insight Midwest L.P.	**TCI of Indiana Holdings, L.L.C.** Insight Communications Company, L.P.	50.00% limited 50.00% limited and general	809,821
	Insight Kentucky Capital, LLC	**TCI of Indiana Holdings, L.L.C.** Insight Communications Company, L.P.	50.00% 50.00%	457,123

[1] Subscriber numbers for Comcast "Wholly Owned Systems" are as of 3/31/05. Subscriber numbers for Clearview Partners, Parnassos Communications, L.P., Century-TCI California Communications, L.P., Insight Midwest L.P., Insight Kentucky Capital, LLC, Texas and Kansas City Cable Partners, L.P., US Cable of Coastal-Texas, L.P., Midcontinent Communications and Bresnan Broadband Holdings LLC are as of January 2005, and subscriber numbers for Millenium Digital Media Programming Ventures, L.L.C. are as of 3/21/05.

	ENTITY	OWNERSHIP	OWNERSHIP %	SUBSCRIBERS
	Texas and Kansas City Cable Partners, L.P.	**Various Comcast Subsidiaries** Various Time Warner Entities	50.00% 50.00%	1,515,702
	US Cable of Coastal-Texas, L.P.	**AT&T Broadband USC L.L.C.** US Cable Holdings, L.P.	48.335% limited 51.664% general	93,898
	Midcontinent Communications	**TCI Midcontinent, LLC** Midcontinent Communications Investor, LLC	50% general 50% general	196,178
	Bresnan Broadband Holdings LLC	**Various Comcast Subsidiaries** Bresnan Ventures LLC Various Financial Investors	50% voting (31% equity) 3.1% voting 46.9% voting	292,587
	Millenium Digital Media Programming Ventures, L.L.C.	**Intermedia Cable Investors, L.L.C.** Millenium Digital Media Holdings, L.L.C.	35% membership 65% membership	118,229
TOTAL				26,100,352

Total MVPD Susbscribers = 92,600,000[2]

Comcast % of MVPD Subscribers = 28.2%

* Comcast entities are shown in bold.

[2] *See* Kagan Media Money, April 26, 2005, at 7.

COMCAST CORPORATION ATTRIBUTABLE SUBSCRIBERS
POST-TRANSACTION

	ENTITY	OWNERSHIP*	OWNERSHIP %	SUBSCRIBERS[1]
Wholly Owned Systems	Comcast cable subsidiaries	**Various Comcast Subsidiaries**	100% interest	23,286,940
Attributable Systems	Clearview Partners	**Comcast Subsidiaries**	30% general partnership interest	9,874
	Insight Midwest L.P.	**TCI of Indiana Holdings, L.L.C.** Insight Communications Company, L.P.	50.00% limited 50.00% limited and general	809,821
	Insight Kentucky Capital, LLC	**TCI of Indiana Holdings, L.L.C.** Insight Communications Company, L.P.	50.00% 50.00%	457,123

* Comcast entities are shown in bold.

1 Subscriber numbers for Comcast "Wholly Owned Systems" are as of 3/31/05. Subscriber numbers for Clearview Partners, Insight Midwest L.P., Insight Kentucky Capital, LLC, Texas and Kansas City Cable Partners, L.P., US Cable of Coastal-Texas, L.P., Midcontinent Communications and Bresnan Broadband Holdings LLC are as of January 2005, and subscriber numbers for Millenium Digital Media Programming Ventures, L.L.C. are as of 3/21/05.

	ENTITY	OWNERSHIP	OWNERSHIP %	SUBSCRIBERS
	Texas and Kansas City Cable Partners, L.P.	**Various Comcast Subsidiaries** Various Time Warner Entities	50.00% 50.00%	1,515,702
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	Millenium Digital Media Programming Ventures, L.L.C.	**Intermedia Cable Investors, L.L.C.** Millenium Digital Media Holdings, L.L.C.	35% membership 65% membership	118,229
TOTAL				26,780,352

Total MVPD Susbscribers = 92,600,000[2]
Comcast % of MVPD Subscribers = 28.9%

[2] *See* Kagan Media Money, April 26, 2005, at 7.

G

EXHIBIT G

Ordover Declaration

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Applications of: ADELPHIA COMMUNICATIONS CORPORATION, COMCAST CORPORATION, and TIME WARNER CABLE INC., For Authority to Assign and/or Transfer Control of Various Licenses	MB Docket No. 05-192

DECLARATION OF JANUSZ A. ORDOVER AND RICHARD HIGGINS

August 5, 2005

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I. Qualifications

A. Janusz A. Ordover

1. My name is Janusz A. Ordover. I am Professor of Economics at New York University, which I joined in 1973. At New York University, I currently teach undergraduate and graduate level courses in industrial organization economics which is the field of economics concerned with competition among business firms and upon which antitrust and regulatory economics are founded. I have devoted most of my professional life to the study and teaching of industrial organization economics and to its application through antitrust and regulatory law and policy.

2. From July 1991 to November 1992, I served in the position of Deputy Assistant Attorney General for Economics in the Antitrust Division of the United States Department of Justice ("DOJ"). In this post, I participated in the drafting of the 1992 Horizontal Merger Guidelines, which have been widely used by courts and antitrust enforcement agencies. I have also been actively involved in the formulation of public policy in the telecommunications and media sectors in the United States and abroad, including Australia and New Zealand.

3. I have written extensively on a wide range of antitrust and regulatory topics. My antitrust articles have appeared in the *Yale Law Journal*, the *Harvard Law Review*, the *Columbia Law Review*, and many other journals, monographs and books, here and abroad.

4. I have acted as a consultant on antitrust and other competition matters to the DOJ, the Federal Trade Commission ("FTC"), and the post-communist governments of Poland, Russia, and Hungary. I have also consulted for the World Bank and the

Organization for Economic Cooperation and Development in Paris. I also serve as a Director of Competition Policy Associates, Inc. ("COMPASS"), an economic consulting firm based in Washington, D.C.

B. Richard Higgins

5. My name is Richard Higgins. I am a Senior Vice President at COMPASS. I have extensive expertise in mergers and acquisitions and antitrust and business litigation, having worked as an economist in both private and public sector roles since 1980. I received a Ph.D. in economics from the University of Virginia in 1969, after which I taught economics at the University of Georgia and Auburn University. Upon completing a post-doctoral fellowship at the University of Chicago, I joined the Federal Trade Commission in 1980. At the FTC, I served in the Bureau of Economics as the Deputy Director for Consumer Protection and Regulatory Analysis from 1982-1985 and, from 1986-1987, as Deputy Director for Antitrust. At the FTC, I provided advice to the Commission and to the Directors of the Bureaus of Economics and of Competition regarding the competitive effects of mergers and acquisitions.

6. Prior to joining COMPASS, I worked at Capital Economics as a Senior Vice President and as its President from 1998-2001. There, I supervised the economic component of several high-profile mergers and acquisitions, such as Michelin/Uniroyal Goodrich, Ashland/Marathon, and Caterpillar/Barber Green. I then joined LECG as a Director in 2001, where I provided litigation consulting services in several private antitrust and consumer protection matters.

7. I have published numerous articles in professional journals and books in

the fields of law and economics, economic regulation and antitrust policy, including "Merger of Bertrand Competitors Can Decrease Price," forthcoming in the Antitrust Bulletin (summer, 2005), "Spatial Competition and Merger," in Topics in Economic Analysis & Policy (2004, www.bepress.com/bejeap), and "Diagonal Merger," in the Review of Industrial Organization (1997).

II. Introduction

8. We have been asked by counsel for Comcast Corporation ("Comcast") to assess the potential competitive effects of the various transactions in which the cable assets of Adelphia Communications Corporation ("Adelphia") would be acquired by Comcast and Time Warner Cable Inc. ("Time Warner") and various other Comcast and Time Warner cable assets would be exchanged.[1] We have also been asked to reply to comments submitted to the Federal Communications Commission ("FCC") in opposition to the proposed transactions involving Adelphia, Comcast, and Time Warner. In particular, we will respond to the declarations submitted by Dr. Gustavo Bamberger and Dr. Lynette Neumann;[2] Mr. J. Gregory Sidak and Dr. Hal Singer;[3] and Dr. Gregory Rose.[4]

9. Based on the information available to us at this time, we have reached the following general conclusions about Comcast's proposed acquisition of cable assets from

[1] While we focus our comments on the alleged post-transaction incentives and ability of Comcast substantially to harm competition, our arguments are generally applicable to both Comcast and Time Warner.

[2] Statement of Gustavo Bamberger and Lynette Neumann, Exhibit A to the Comments of DIRECTV, Inc. ("Bamberger/Neumann Statement").

[3] Declaration of J. Gregory Sidak and Hal J. Singer, Attachment 1 to the Petition to Impose Conditions or Deny of TCR Sports Broadcasting Holding, L.L.P. ("Sidak/Singer Declaration").

[4] Declaration of Gregory Rose, Attachment C to the Petition to Deny of the Media Access Project ("Rose Declaration").

Adelphia and the various exchanges of assets between Comcast and Time Warner:[5]

- The proposed acquisition of the Adelphia assets by Comcast, and the transfer of assets between Comcast and Time Warner, is unlikely to reduce substantially competition in the provision of MVPD services or the distribution of Regional Sports Networks ("RSN") programming. In fact, the commenters opposed to the transaction provide no reliable evidence that such harmful effects are likely to materialize in any relevant market. Moreover, their theoretical arguments as to the potential harm from the transaction are also flawed.

- The commenters claim that the transaction will harm competition in several ways: (1) that it will lessen competition between Comcast (and/or Time Warner) and other providers of multi-channel video programming services to households, and relatedly increase prices to subscribers; (2) that the transaction will increase the risk of foreclosure of rival MVPD suppliers from Comcast RSN programming; (3) that it will increase the risk of foreclosure of rival RSNs from Comcast (or Time Warner) cable systems; and (4) that it will enable Comcast (or Time Warner) to exercise monopsony (buyer) power vis-à-vis unaffiliated RSNs.

- As we explain in detail below, these competitive concerns are unfounded:

- We analyze two relevant product markets identified by commenters in assessing the potential competitive effects of the transaction: (1) the markets for buying and selling *programming* for multi-channel video programming distribution ("MVPD"), and (2) the market for the *distribution* of MVPD services, including RSNs, to retail customers. Purely for the purposes of this submission, we assume that some RSNs may possess market power in their respective footprints; we do not express an opinion as to the scope of the product market(s) in which any particular RSN operates.

- Commenters appear to agree that with respect to the RSNs the relevant geographic markets in which to assess the proposed transaction are the RSN "footprints". We do not express any conclusions regarding the geographic scope of the markets in which RSNs compete. Purely for the purposes of this submission, we assume that RSNs' footprints constitute relevant geographic markets.

- Despite the commentors efforts to the contrary, it is important to keep in mind that Comcast, Adelphia, and Time Warner do not compete head-to-head in the MVPD distribution market. As a result, Comcast's acquisition of Adelphia cable assets and Comcast's exchange of cable assets with

[5] We refer to this totality of business deals as a "transaction".

Time Warner do not relax the competitive constraints on price and service quality in any MVPD distribution markets in which Comcast (and Time Warner) currently operate.

- Comcast, Adelphia, and Time Warner also do not compete against each other as buyers of RSN programming content, or any other content.[6] Since RSN programming is a non-rivalrous good (*i.e.*, the consumption of RSN programming by one MVPD does not reduce the consumption opportunities available to another MVPD)[7] and thus can be offered to numerous MVPDs at the same time, the competitive concerns from increased concentration cannot be plausibly gauged using such measures of concentration as the Herfindahl-Hirschman Index ("HHI").[8]

- The non-rivalrous nature of video programming (including RSNs) also implies that the increases in Comcast (or Time Warner) subscriber bases, even in the RSN footprints, will not enable it to exercise monopsony power over suppliers of RSN programming. In particular, the commenters do not show that the increases in the subscriber base would enable Comcast (or Time Warner) to depress the quality of programming or cause programming not to be offered.

- Even more to the point is that commenters fail to show how the relatively modest increase in market share in each RSN footprint would endow Comcast (or Time Warner) with such monopsony power as to harm suppliers of programming to the detriment of the viewing public.

- Commenters also claim that by expanding their subscriber bases and by enlarging geographic clusters, the proposed transaction will enhance Comcast's incentives and ability to foreclose other MVPDs from access to sports programming in geographic markets in which Comcast already owns an RSN. (We refer to these as "vertical" competitive effects from a "horizontal" transaction.) We disagree with this argument. Modest expansions in Comcast's number of subscribers in the RSN footprints as a result of the related transactions will not materially affect Comcast's incentives and ability to engage in conduct that forecloses rival distributors of MVPD programming. In fact, the "vertical" concerns expressed by the commenters do not stand up to economic scrutiny.

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[6] Although our discussion is confined to sports programming, it is more broadly applicable, of course.

[7] For a fuller description of rivalrous and non-rivalrous goods and the implications for monopsonizing RSN programming, *see* Declaration of Janusz A. Ordover on Behalf of AT&T Corp. FCC MB Docket No. 02-70.

[8] In fact, as we shall argue below, the reliance on the HHIs and changes in the HHIs (so called "deltas") is singularly misplaced in the present context.

III. The Relevant Markets for the Proposed Transaction

10. Delineation of the relevant market – both product and geographic – is an important step in the competitive analysis of a merger. The procedures for defining relevant markets are well-known and are delineated in the 1992 Horizontal Merger Guidelines.[9] The FCC has adopted a similar standard for market definition in past transaction proceedings.[10] Briefly, the market definition step seeks to identify those products (services) and the locations of supply which likely will exert significant constraints on the ability of the parties to elevate prices (or lower quality) after the transaction. The focus of the market definition step is on demand substitution considerations (*i.e.*, the degree to which consumers will substitute away from the products of the parties' in response to a small but non-transitory price increase). The ability of a firm (or a group of firms) to raise product prices profitably after the merger depends on the extent to which consumers view non-parties' products as providing similar services or benefits (*i.e.*, the degree that products are substitutable from the standpoint of buyers).

11. The Merger Guidelines construct the relevant market by starting with the product (or products) of the merging parties and then expand the universe of the products such that a hypothetical monopolist controlling the smallest collection of these products would be able to implement profitably a small but significant, non-transitory price

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[9] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, April 8, 1997 at Section 1.1 ("Horizontal Merger Guidelines"). Also, *see* Robert Willig, "Merger Analysis, Industrial Organization Theory, and Merger Guidelines," *Brookings Papers on Economic Activity*, edited by Martin Baily and Clifford Winston, 1991, pages 281-331.

[10] *See, e.g.*, Federal Communications Commission, *Memorandum Opinion and Order*, In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control, FCC 03-330 (released January 14, 2004) ("News Corp-Hughes Order") at 27-28.

increase.[11] This procedure assures that the relevant market contains the smallest agglomeration of products that exercise a calibrated constraint on the pricing of the parties' products or services. This does not mean, however, that products (services) that are not included in the market so constructed do not exercise any constraint on the parties' products. Far from it: these excluded products do exercise a constraint but, given the calibration procedure adopted, they exercise a lesser constraint since they are perceived as less good substitutes than the included products.

12. In this transaction, unlike in some other merger inquiries, the definition of the relevant product market(s) is not critical to its competitive assessment.[12] Therefore, we only offer brief comments on the topic of market definition here. The submissions opposed to the transaction define two relevant product markets in which to analyze the acquisition of Adelphia's cable assets and the related transactions between Comcast and Time Warner. These are, (1) the markets for selling and buying video programming, and (2) the market for the distribution of MVPD services to retail customers.[13] We term the former alleged relevant markets as the *programming* markets and the latter as the *distribution* market.

13. Opponents focus primarily on the impact of the proposed transaction on competition in *regional* programming and video distribution markets, specifically on licensing and distribution of RSN programming.[14] The FCC has previously concluded

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[11] *See* Horizontal Merger Guidelines at Section 1.1.

[12] This is not to say that in other transactions one could not also dispense with the market definition step. *See, e.g.,* Jonathan B. Baker, "Product Differentiation through Space and Time: Some Antitrust Polciy Issues," *Antitrust Bulletin,* 1997, pages 177-197.

[13] *See, e.g.,* Comments of DIRECTV, Inc., pages 6-7, and generally, Bamberger/Neumann Statement, Sidak/Singer Declaration, and Rose Declaration.

[14] *Ibid.*

that at least some RSNs exercise market power in the relevant markets containing them.[15] We do not challenge this conclusion here because in our view it is unnecessary to do so. In particular, we do not opine on whether RSNs constitute a relevant product market under the Merger Guidelines methodology. Indeed, evidence suggests that at least some RSNs compete against other types of programming both for viewers and advertiser dollars. Nevertheless, we proceed on the assumption that RSNs constitute relevant product markets within their distribution footprints.[16]

14. Given the focus on the competitive concerns that center around the RSNs, we also devote most of our discussion below to the examination of competitive effects of the proposed transaction on the purported relevant product markets comprised of RSNs. We examine the competitive effects both at the level of acquisition of programming rights as well as at the level of retail and wholesale[17] sale of RSN programming.[18]

IV. Competitive Effects of Proposed Transaction

15. Under the Merger Guidelines methodology, once the relevant markets are determined, competitive assessment moves on to the identification of the firms that operate in the relevant markets and then to the examination of concentration in these markets. The Guidelines measure concentration using the Herfindahl-Hirschman Index

[15] *See*, e.g., News Corp-Hughes Order at 34.

[16] RSNs are available on an "out-of-market" basis, but the vast majority of RSN consumers are "in-market" consumers; that is, they live within the RSN footprint.

[17] In our terminology, wholesale distribution entails licensing of distribution rights to other MVPDs by a vertically integrated owner of the programming rights.

[18] It is unclear whether the commenters regard Comcast/Charter Sports Southeast ("CCSS") as its own relevant market. CCSS is not carried by either DIRECTV or EchoStar and neither has presented any evidence that it has suffered any competitive disadvantage in CCSS's footprint. This could be attributed to the fact that CCSS does not appear to offer currently the types of high-profile regional sports programming that would make CCSS the type of channel that opponents of this transaction allege is "must-have" programming. The same argument could be made about Comcast Detroit (Local).

("HHI") of concentration. Several commenters calculate the pre- and post-transaction HHIs and conclude that, based on these HHIs alone, the transaction raises serious competitive concerns and should either be enjoined or at least subject to significant additional enforceable conditions to safeguard the public interest.[19]

16. In light of these findings it is important to comment why the HHI and the changes therein are not a useful tool for gauging the competitive effects of the proposed transaction, given the competitive theories propounded by commenters, such as DIRECTV, TCR, and the Media Access Project ("MAP").

17. In the instant case, the relevance of the HHIs as a competitive metric is, to say the least, quite limited. The obvious reason is that, from the standpoint of the subscribers to MVPD services, Adelphia and Comcast (and Comcast and Time Warner) are not horizontal competitors whose rivalry for subscribers will be extinguished after the merger. Simply stated, the proposed merger of Comcast and Adelphia does not consolidate the assets (such as subscriber bases) of competing MVPDs: since plainly, these two cable operators do not compete with each other for cable subscribers. For example, a customer in the District of Columbia cannot choose between Comcast and Adelphia MVPD services.[20] The same is true with regard to swaps of cable subscribers between Comcast and Time Warner systems; the swaps do not reduce the competitive choices available to consumers of MVPD services.

18. The commenters try to bolster their reliance on the HHIs on the theory that putative increases in concentration – as measured by the changes in the HHIs from the

[19] It is interesting to note that the Bamberger/Neumann Declaration presents the most detailed analysis of pre- and post-transaction HHIs, but – as noted below – it curiously fails to draw any conclusions based on those changes.

[20] A customer in the District of Columbia can also choose among DIRECTV, EchoStar, and RCN/Starpower. The point is that Adelphia is not an alternative MVPD choice for such a customer.

pre-transaction levels – will make it more difficult for the subscribers to compare prices charged by their cable company to the prices of some other relevant benchmark (a contiguous cable company, for example). The commenters offer no evidence, however, that such putative diminution in benchmarking abilities is even a relevant competitive concern or, even if it were, the magnitude of the concern can or should be gauged using the HHIs (or changes therein).

19. The commenters also rely on the HHIs in their analyses of the allegedly concentrating effects of the transaction on the ability of Comcast and Time Warner to exercise enhanced buyer power vis-à-vis program suppliers. While it is fair to say that traditional monopsony (buyer-power) analysis shows that buyer concentration, under certain circumstance, can be detrimental to the sellers of the input, the key question is whether concentration on the buyer side as measured by the HHI and change in the HHI has any direct relevance for the competitive concerns articulated by the commenters in their complaints. Our answer is in the negative.[21]

A. The Theory of Monopsony is Irrelevant in this Matter

20. The additional difficulties with the commenters' concerns with post-transaction accretion of buyer power are further undermined by the fact that we are not dealing here with purchasers acquiring typical rivalrous products (such as steel or nursing services)[22] for which the economics of monopsony power was developed.[23] But the

[21] Commenters appear to agree that the transaction will not enhance buyer power for nationally distributed programming.

[22] A product is said to be rivalrous if purchase of the product by Buyer A prevents Buyer B from purchasing that same unit of the product.

[23] *See* Declaration of Janusz A. Ordover on Behalf of AT&T Corp. FCC MB Docket No. 02-70 at 14-16. Applications for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corp.,

consumption of a video programming network, such as an RSN, is non-rivalrous. As the FCC found, the "consumption of the programming of a video programming network... by one viewer does not reduce the amount of the good available for another viewer."[24] This feature of video programming flows from the fact that once content is developed, it can be distributed at virtually zero marginal cost to any buyer. In such a setting, whether an individual MSO does, or does not, purchase the programming does not affect the marginal cost of making the programming available to others.

21. These factors undermine the normal intuition that a very large purchaser may be able to exercise – or will have an incentive to exercise – traditional forms of monopsony power over sellers. Even if an MVPD licensee of extant programming were able to drive a harder bargain with the owner of the RSN the larger its share of distribution, the usual implication that market price falls in the rest of the market does not follow since the quantity of extant programming supplied is perfectly elastic (i.e., the supply price does not fall when less is purchased or rise when more is purchased). In any case, if the direct effect of the proposed transaction between cable providers would be to reduce the license fee paid for programming by the merged entity, this does not mean inefficient constriction in supply, as noted earlier, unlike the situation in the standard monopsony setting. Moreover, it has been demonstrated that in some contexts the hypothetical "monopsonist" MVPD provider may in fact be placed at a *disadvantage* in bargaining if its share increases.[25]

Transferors, To AT&T Comcast Corporation, Transferee, February 28, 2002, Applications and Public Interest Statement, VI. B. 3., Buyer Market Power, page 72.

[24] Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, 16 FCC Rcd 17312, ¶ 15 (2001) ("Cable Rules Remand Notice").

[25] *See* T. Chipty and C. Snyder, "The Role of Firm Size in Bilateral Bargaining: A Study of the Cable TV Industry," *Review of Economics and Statistics*, 1999, pp. 326-340.

22. For these reasons, commenters do not focus on typical horizontal competitive effects from the proposed horizontal transaction. Commenters argue, instead, that the proposed transaction will have anticompetitive effects that will flow from changes in "vertical" incentives. These vertical incentives will be especially tilted in an anticompetitive fashion, they claim, with respect to licensing and distribution of regional sports programming. As we shall see, these claims are not substantiated, if only because the transaction does not significantly expand Comcast's shares in various RSN footprints. Moreover, there are other reasons why these incentives – even if such were materially affected, which they are not – likely will not be acted upon. We shall show that Comcast's incentives and ability to engage in conduct that harms the public interest after the transaction is completed will not be enhanced.

B. Vertical Competitive Effects

23. Before turning to the specific theories raised by the commenters, it is important to note that Comcast is already vertically integrated, so that issue is not specific to the transaction. As we noted, the real question is whether by expanding its subscriber base its incentives in the vertical chain will be materially affected. This issue is especially pertinent to regional sports programming. That is, the issue we need to examine is whether the proposed transaction, by increasing Comcast's and Time Warner's shares in the pertinent MVPD distribution markets, significantly alters Comcast's (or Time Warner's) incentives or ability to engage in anticompetitive practices in any relevant markets.

24. Commenters advance three distinct reasons why the transaction could engender such competitive concerns centered around the alleged pivotal importance of regional sports programming. First, they argue that post-transaction, Comcast will have an increased ability and incentive to discriminate against competing RSNs in favor of its affiliated RSNs; second, they claim that Comcast (and Time Warner) will have an increased ability and incentive to acquire exclusive rights to nonaffiliated RSNs; and third, they contend that Comcast will have an enhanced ability and incentive to discriminate against competing MVPDs in the distribution of affiliated RSNs by either temporarily withholding its RSNs or raising prices in an anticompetitive fashion.

25. As we show below, each of these theories is unfounded. In fact, the almost fatal flaw in these arguments is that, in many cases, commenters do not even bother to spell out clearly the nexus between the proposed transaction and the underlying theory of anticompetitive harm. Where commenters do connect the proposed transaction to a theoretical construct of competitive harm, they fail to present empirical evidence to support that theory.

26. In evaluating commenters' claims, it is important to note that these claims must be evaluated on a market-by-market basis. As noted, most commenters assert (and we assume for the purposes of this submission) that the RSN footprint constitutes a relevant market for the purpose of analyzing the competitive effects of the transactions. The commenters make vague generalizations and abstract claims about the effects of the transaction on Comcast or Time Warner's incentives or ability to engage in allegedly anticompetitive practices. This will not do. Instead, the analysis must be rooted in the

particular facts of the particular markets at issue. As shown below, many of commenters' theories are not connected to the facts of each particular market's circumstances.

27. Bearing this point in mind, one common fact is important to anchor the discussions of each of the purported theories of competitive harm: Comcast's increase in the number of subscribers from the proposed transaction in the RSN footprints where it controls a bona fide RSN is quite modest. (See Table 1.)[26] In fact, in these same areas, Comcast's post-merger share of TV households is less than 40 percent with one exception, which is the Comcast Sports Net-Philadelphia ("CSN-Philadelphia") footprint. However, Comcast's extant conduct in Philadelphia is irrelevant for this transaction. Specifically, Comcast already withholds its RSN programming from its DBS competitors in the CSN-Philadelphia footprint; thus, there is no basis for predicting that consumers in the CSN-Philadelphia footprint will be adversely affected by the proposed transaction. Moreover, in this footprint, Comcast's post-merger share is only three percentage points (or six percent) higher than its pre-merger share. Consequently, it cannot be concluded that Comcast's incentives to withhold programming in the CSN-Philadelphia footprint are going to be materially changed by the transaction, one way or the other.

28. As a result, it is incumbent upon the commenters to show how the *change* in Comcast's number of subscribers and in its "market share" in each of these RSN footprints will *change* Comcast's incentive and ability to engage in some variant of the "vertical" anticompetitive conduct.

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[26] The shares in Table 1 were calculated based on data provided by Comcast.

TABLE 1
Comcast's Share of TV Households in Affiliated RSN Footprints

Affiliated RSN	Pre-Deal	Post-Deal	Change
Comcast SportsNet West	23%	23%	No significant change
Comcast SportsNet Chicago	20%	20%	No significant change
Comcast SportsNet MidAtlantic	30%	38%	8 percentage points
Comcast SportsNet Philadelphia	53%	56%	3 percentage points
Comcast/Charter Sports Southeast	16%	20%	4 percentage points

1. <u>Will the Proposed Transaction Facilitate Discrimination by Comcast Against Competing RSNs?</u>

29. TCR claims that the proposed transaction will increase the incentive and ability of Comcast to discriminate against unaffiliated RSNs, such as its Mid-Atlantic Sports Network ("MASN"), in favor of Comcast SportsNet-Mid Atlantic. There are numerous reasons why TCR's claim with respect to MASN is unfounded and misguided.

30. *First*, a necessary condition for the alleged anticompetitive discrimination

[27] We used market shares based on the estimated number of TV households in the footprint because we do not have access to reliable data on the number of MVPD subscribers in a RSN footprint. While the use of TV households lowers the reported market shares, our conclusions are unaffected inasmuch as 85 percent of TV households nationwide subscribe to MVPD service. *See e.g.* Federal Communications Commission, Eleventh Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 04-227 (released February 4, 2005) at Table B-1.

to be even feasible is that Comcast has substantial market power in the MVPD distribution market in the relevant geographic area. Commenters have not provided evidence of such market power. For example, DIRECTV's economists – Dr. Bamberger and Dr. Neumann – have merely calculated HHIs in RSN footprints without any explanation why these metrics matter for the assessment of the anticompetitive concern. In particular, HHIs are not sufficient statistics for assessing unilateral market power or market dominance. Moreover, the more relevant question is whether the change in Comcast's subscriber base will materially change the incentives and the ability to engage in *anti*competitive discrimination.[28]

31. *Second*, if TCR's claim is that Comcast is anticompetitvely discriminating against it by not carrying its programming, TCR must explain why other MVPDs are also choosing not to carry MASN. For example, thus far, Cox, EchoStar, and Adelphia have chosen not to carry MASN.[29] These other major MVPDs do not have an ownership stake in a competing RSN, which makes any claim that Comcast is discriminating against TCR *because* it owns a competing RSN tenuous, at best.[30]

32. Comcast has a number of rationales for not carrying MASN. Comcast and TCR are currently in a dispute over certain programming rights, which – depending upon the outcome of that dispute – could affect the value of MASN. In addition, the situation with the Washington Nationals – whose games are shown on MASN – is unique; usually, an RSN distributes most games for a MLB team. Respecting the Nationals, during this

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[28] It is now well-accepted in economics that discrimination is not unambiguously detrimental to economic welfare.

[29] *See* Eric Fisher, "MASN Ads Take Aim at Comcast," *Washington Times*, June 27, 2005.

[30] Moreover, we understand that the FCC rules prohibit Comcast from discriminating against unaffiliated programmers, such as MASN. MASN has, in fact, commenced a proceeding against Comcast pursuant to these rules. Be that as it may, there is still a question whether Comcast's incentive to continue to engage in such allegedly discriminatory conduct is at all affected by the transaction.

season nearly half of their games are being televised over-the-air on a channel available on Comcast's local systems.

33. *Third,* if TCR's claim were correct, we should observe Comcast carrying unaffiliated RSNs only in areas where it does not have an RSN or where it has a low market share. But Comcast carries every major, unaffiliated RSN in the country (except MASN), even in areas where it has a competing RSN and where it has a very high share of the customers in the footprint. There are four areas in which Comcast has management control over a network that have at least one RSN rival: CSN-West; CSN-Mid Atlantic; CSN-Chicago; and CCSS.[31] In every case – other than CSN-Mid Atlantic – Comcast carries the competing RSN: Fox Sports Net Bay Area; Fox Sports Net Chicago; Fox Sports Net Florida ("FSN Florida"); Fox Sports Net South; and Sun Sports. Also, there are several DMAs where Comcast's MVPD share is significantly higher than what Comcast's share will be in the CSN-Mid Atlantic footprint, yet in those DMAs – such as Chicago, Boston, San Francisco, Detroit, Seattle, and Grand Rapids/Lansing – Comcast carries all unaffiliated RSNs.[32]

34. *Fourth,* TCR's economists note that RSNs constitute valuable programming, and the lack of carriage of an RSN can cause MVPD consumers to switch from one MVPD to another. But, if MASN contains valuable local sports programming, then Comcast's refusal to carry MASN (or any other RSN for that matter) must harm it and induce a possibly significant number of customers to switch from Comcast to, say, DIRECTV (which carries MASN). TCR and its economists cannot simultaneously argue that MASN offers valuable programming *and* that Comcast has the incentive to

[31] Comcast also has a regional network in Detroit, but like CCSS, it is not a bona fide RSN. In any event, consistent with Comcast's pattern of carrying competing RSNs, Comcast carries Fox Sports Net-Detroit.
[32] Based on a review of the channel lineups reported on Comcast's website.

discriminate against MASN without putting forward some empirical evidence that Comcast's profits would in fact materially increase if it were to enter into a deal with MASN on the terms that MASN wants, whatever these may be.

35. For these reasons, there is no support for the arguments of TCR and its economists that the proposed transaction will increase the incentive and ability of Comcast to discriminate against unaffiliated RSNs.

2. Does Proposed Transaction Facilitate Exclusive Deals with Unaffiliated RSNs?

36. DIRECTV claims that the proposed transaction will increase the incentive and ability of Comcast (and Time Warner) to enter into exclusive contracts with unaffiliated RSNs. As a starting point, vertical integration and exclusive arrangements are generally procompetitive, so it is incumbent upon DIRECTV (or its economists) to show why an exclusive deal between Comcast and an unaffiliated RSN would be anticompetitive.

37. In fact, it is ironic that DIRECTV argues that an exclusive arrangement between Comcast (or Time Warner) and an unaffiliated entity would be anticompetitive, given that DIRECTV itself has used its exclusive NFL Sunday Ticket to enhance competition in the MVPD distribution market. By all accounts, DIRECTV has been able to attract a substantial number of subscribers as a result of its exclusive arrangement with the NFL, which has put competitive pressure on cable companies to respond procompetitively.[33]

38. In addition, DIRECTV has available to it rather effective counterstrategies in the event that Comcast (or Time Warner) tried to enter into exclusives with some unaffiliated RSN: since DIRECTV's parent, News Corp., controls roughly half of the

[33] *See, e.g.*, http://www.directv.com/DTVAPP/aboutus/headline.dsp?id=11_08_2004B

RSNs that DIRECTV identifies as problematic in its filing, it could readily prevent the RSNs at issue from entering into such deals. It is also unclear why DIRECTV should be concerned about its parent entering into an exclusive with Comcast, especially since we understand that News Corp. is prohibited from granting exclusives under the FCC Order approving its acquisition of DIRECTV.

39. Despite the fact that DIRECTV alleges that the transactions will provide the incentive and ability of Comcast (and Time Warner) to enter into exclusive arrangements with unaffiliated RSNs, DIRECTV's economists – Dr. Bamberger and Dr. Neumann – do not present any analysis of this theory. In fact, DIRECTV's economists only produced an analysis of the impact of the transaction on HHIs in various areas and did not connect that analysis with *any* allegation that the proposed transaction would harm competition in any relevant market. The reason is likely that the HHIs presented in the Bamberger/Neumann Statement, and misused in the DIRECTV Comments, are effectively irrelevant for assessing the impact of the proposed transaction on consumers and the theories put forward in the DIRECTV Comments.

40. It is also interesting to note that News Corp. has succeeded in building and maintaining its leading position as a supplier of RSN programming, despite the fact many of these RSNs are located in markets that are "highly concentrated" according to the HHI analyses put forward by DIRECTV's economists.[34] In other words, News Corp. has succeeded in obtaining rights to professional sports teams in markets that were far more highly concentrated than the markets in which its economists perceive competitive

[34] Assuming that the data presented in the Bamberger/Neumann Statement is accurate (and we have not independently verified their calculations), six of sixteen Fox RSNs face MVPD concentration as measured by the HHIs that exceed the Guidelines "highly concentrated" thresholds (see, footnote 2, *supra*). Of course, we do not consider the "highly concentrated" threshold to have any relevance for the matters at hand.

dangers, and even though News Corp. did not have any MVPD subscribers in these footprints at the time that they obtained the programming rights.

41. Finally, we are aware of only one exclusive deal between a cable company and an unaffiliated RSN, which is the deal between Time Warner and Carolina Sports Entertainment Television ("C-SET").[35] Tellingly perhaps, C-SET recently announced that it was ceasing operations. An article in the *Sports Business Journal* noted that the exclusive arrangement between Time Warner and C-SET limited C-SET's distribution, and "not surprising to many critics who questioned whether C-SET would be viable without broad distribution, the team-owned network didn't last."[36] The president of the Charlotte Bobcats, the owner of C-SET, even conceded that "the narrow distribution did not allow C-SET to reach its revenue targets, nor did it help the expansion Bobcats gain adequate exposure to potential fans."[37] He noted that the team now seeks "the widest possible distribution" for games.[38]

42. In summary, DIRECTV and its economists have failed to show how an exclusive deal between Comcast or Time Warner and an unaffiliated RSN would harm competition. They have also not identified any particular unaffiliated RSN with which Comcast or Time Warner could even enter into an exclusive deal. Indeed, it is clear that Comcast or Time Warner could *not* enter into exclusives in most regions affected by this transaction, since DIRECTV's parent controls the RSNs in these regions. And they have not shown why Comcast or Time Warner (or an unaffiliated RSN) would want to enter

[35] We have been advised that Time Warner provided license fee payments to assist the launch of this nascent network, but held no attributable ownership interest.
[36] Andy Bernstein, "Bobcats Looking for Wide Exposure After C-SET's Shutdown," *Sports Business Journal*, July 11, 2005, page 5.
[37] *Ibid.*
[38] *Ibid.*

into any such arrangement, given the recent failure of C-SET which had the type of exclusive arrangement that concerns DIRECTV. Even more importantly, DIRECTV and its economists have not demonstrated empirically that the transaction would significantly enhance Comcast's or Time Warner's incentives to enter into any exclusives least of all potentially anticompetitive exclusives with RSNs.

3. Does The Proposed Transaction Increase Comcast's Incentive or Ability to Withhold Its RSNs Permanently or Temporarily – or To Raise The Price of Its RSNs?

43. Commenters raise three competitive concerns regarding Comcast's owned or controlled RSNs. First, they allege that the proposed transaction may facilitate a permanent withholding of Comcast's RSNs from other MVPDs. Second, they allege that the proposed transaction will increase the likelihood of a temporary withholding of its affiliated RSNs. And finally, they allege that the proposed transaction will allow Comcast to raise the subscriber fee associated with its RSNs. As we show in this section, these competitive concerns are unwarranted.

44. Before turning to our analysis of these concerns, we note that some commenters have asserted that there are more serious competitive issues engendered by this transaction than by the News Corp.-DIRECTV transaction because Comcast's market share in any particular RSN footprint is significantly higher than DIRECTV's market share at the time of its transaction with News Corp.[39] Such a perspective is misguided. An important difference that needs to be highlighted is this: if News Corp. withheld programming of one of its RSNs from rivals of DIRECTV, DIRECTV could (and likely would) potentially acquire virtually all of the subscribers who decided to

[39] See *Applications of Adelphia Communication Corporation, Comcast Corporation, and Time Warner Cable Inc., Comments of DIRECTV*, Inc., July 21, 2005, Discussion, I.C.1. and footnote 38, page 12.

terminate service because the rival MVPDs did not offer News Corp.'s RSN.[40] By comparison, if Comcast were to withhold its RSN from DIRECTV and EchoStar in an area where Comcast has half of the cable customers, roughly 50 percent of customers departing DBS due to withholding likely would subscribe to the remaining cable provider.[41] The point is – focusing again on the economics of withholding RSN programming – that DIRECTV can potentially provide service to every subscriber in the footprint while Comcast provides service only to a portion of MVPD subscribers in the footprint. As a result, Comcast cannot obtain the full "benefit" of withholding its programming.

45. Two other factors differentiate this transaction from the News Corp.-DIRECTV transaction. First, News Corp. was not vertically integrated when it acquired DIRECTV whereas Comcast is already vertically integrated. As noted above, the issue presented by this transaction is *not* the competitive effects of vertical integration generally, but instead the competitive effects of a modest growth in Comcast's market share in the distribution footprint of its affiliated RSNs on its putative incentives to disadvantage its MVPD rivals. Second, a significant share of DBS subscribers cannot terminate DBS service (without significant penalties) because of the contracts they entered into when they subscribed to DBS service. We estimate that roughly 30 percent of DIRECTV's subscribers could be in such a position.[42] As a result, even if Comcast

[40] DIRECTV could not have obtained those subscribers who cannot view its satellites in the southern sky.
[41] Of course, that cable provider need not be an overbuilder. That cable provider merely serves the remaining 50 percent of cable eyeballs in the RSN's pertinent footprint.
[42] According to DIRECTV's SEC filings, it had net subscriber growth of 1.8 million between March 2004 and March 2005. With a monthly churn rate of roughly 1.5 percent, DIRECTV must have added roughly 4.5 million gross new subscribers during that period. That means that roughly 30 percent of DIRECTV's 14.5 million subscribers in March 2005 had been subscribers for less than one year. A very high percentage of these subscribers likely benefited from one of DIRECTV's promotions, which requires at

were to withhold temporarily its RSN programming from DBS providers, the effect of that withholding would be substantially attenuated by the presence of these long-term contracts. Unlike DBS, cable providers generally do not offer promotions that require customers to commit to a specified contract term. Therefore, the effects of News Corp. withholding temporarily RSNs from a cable provider may be more significant than the effects of Comcast withholding temporarily an RSN from DBS providers. This point is ignored by commenters.

46. In sum, we do not concur with the view that this transaction engenders competitive concerns that surpass those identified in the News Corp.-DIRECTV transaction. We have no views on the competitive risks from that past merger and on whether FCC was correct in imposing various mitigation requirements. Rather, we are of the view that the instant transaction does not engender competitive risks when assessed within its own four corners. Below we comment on risks of the various anticompetitive strategies adduced by the commenters.

i. Permanent Foreclosure

47. The transaction is unlikely to increase the likelihood that Comcast will permanently withhold its RSNs from other MVPDs for several reasons.

48. *First,* we understand that permanent foreclosure is *prohibited* by the program access rules because Comcast's RSNs, except for CSN-Philadelphia and CCSS, are at this time satellite delivered.[43]

least a 12-month commitment to DIRECTV. More recent promotions involve customers committing to 24 months of service. *See* http://www.directv.com/DTVAPP/get_directv/currentoffer.dsp.

[43] Various commenters assert that Comcast could use its national fiber network in order to transition its affiliated RSNs to terrestrial delivery and circumvent the program access rules. We understand that this claim is baseless. First, Comcast is building its national fiber network primarily to carry data, such as Internet traffic and telephony. Second, we understand that Comcast already possesses regional terrestrial networks, but it has never attempted to transition delivery of an RSN to any of these networks. CSN-

49. *Second,* DIRECTV's speculation that Comcast will evade the program access rules by "migrating" its affiliated RSNs to terrestrial delivery is not plausible. Virtually every RSN of consequence is delivered by satellite, and this practice does not appear to be affected by the presence of cable clusters, even where the RSNs are affiliated with cable operators. Notably, Comcast has created and/or invested in several RSNs (*e.g.*, CSN-Chicago, CSN-West), since the creation of CSN-Philadelphia, but has not chosen to distribute any of these RSNs via terrestrial means. Comcast has not migrated a single satellite-delivered network to terrestrial delivery.

50. *Third,* as noted above, a case-by-case evaluation of the "markets" where Comcast manages affiliated RSNs reveals the lack of foundation for the arguments put forward by the commenters. Such a case-by-case review is essential, since commenters have taken the position that each RSN footprint constitutes a separate relevant geographic market.

51. In Philadelphia, the terrestrial transmission exception to the program carriage rules allows Comcast to withhold permanently CSN-Philadelphia programming from others. But Comcast has already decided to withhold it from DBS rivals, and this business decision is unaffected by the proposed transaction. In other words, the issues regarding Comcast's withholding of CSN-Philadelphia are not transaction specific and will not be affected by the transaction.

52. In Chicago and in Sacramento, where Comcast also manages and controls the RSNs, the impact of the transactions on Comcast's market share is exceedingly small. Accordingly, this transaction cannot have a significant effect on

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Philadelphia is terrestrially delivered in large part because its predecessor, PRISM, was also terrestrially delivered.

Comcast's incentive to engage in permanent foreclosure.

53. In the CCSS footprint, Comcast is growing its share by only four percentage points. No commenter explains why this modest increase in market share would materially alter Comcast's incentives to engage in permanent foreclosure. Combined with the fact that CCSS does not carry professional sports teams and neither DIRECTV nor EchoStar currently carry CCSS (and, we understand, have not sought to carry CCSS in the past), the transactions are unlikely to have any merger-specific competitive effect on the distribution of CCSS.

54. Finally, in the CSN-Mid Atlantic footprint, Comcast is growing its market share by roughly eight percent of TV households. Once again, none of the commenters ever attempts to demonstrate why such a modest increase would suddenly make a permanent foreclosure strategy profitable. Indeed, the FCC concluded in the News Corp.-DIRECTV proceeding that the costs of permanent foreclosure did not justify its benefits. We are not aware of any reason why this conclusion should be any different here than that reached by the FCC in its assessment of the News Corp.-DIRECTV.

ii. Temporary Foreclosure[44]

55. In the News Corp.-DIRECTV proceeding, the FCC stated that it believed that News Corp. could engage profitably in a "temporary" foreclosure strategy. The basic model employed by the FCC suggested that the *cost* to News Corp. of a temporary foreclosure strategy was equal to the per-subscriber monthly license fees and advertising

[44] It is well-known that "temporary withholding strategy" could be rather costly to a firm that attempts it. For example, subscribers who have been victims to temporary withholding in the past may become inured to the strategy; content providers may object to such strategy; and the network that engages in such tactics may have difficulty getting programming in the future. Thus, in assessing the likelihood of engaging in a temporary withholding strategy, all factors influencing the incentives to engage in it need to be carefully weighed.

revenues foregone due to withholding, multiplied by the number of rival MVPD subscribers for whom the RSN programming is made unavailable, multiplied again by the number of months of withholding.

56. The FCC model suggested that the *benefit* to News Corp. of a temporary foreclosure strategy was that some portion of the subscribers lost by the foreclosed rivals turn to the firm withholding the RSN programming. These additional subscribers bring a net margin that persists for some expected number of months given average churn rates.

57. For the instant transaction, the critical question is how – and the extent to which – the proposed transaction *changes* Comcast's incentives to engage in such a strategy, if at all.

58. A case-by-case evaluation of the relevant markets again shows that commenters' theories are not supported by the facts. As noted above, the transaction does not increase Comcast's share of the RSN footprint in Sacramento and Chicago, so there can be no plausible merger-specific competition concerns. In Philadelphia, Comcast already permanently withholds its RSN from DIRECTV and EchoStar, so again there can be no merger-specific competitive effect. (As an aside, Comcast's growth as a result of the transactions is quite modest in Philadelphia.) In the CCSS footprint, neither DIRECTV nor EchoStar carry the RSN and we understand that neither has ever sought to carry CCSS. Again, no merger-specific competitive effect is therefore plausible in the CCSS footprint.

59. In the footprint of Comcast-Mid Atlantic, according to data provided by Comcast, 30 percent of the television households subscribe to Comcast for MVPD service. In the same area, Adelphia accounts for roughly eight percent of TV

households.[45] The ultimate issue of concern is therefore whether the *addition* of eight market share points is sufficient to tilt the profitability calculus from no-foreclosure (since Comcast has not engaged in such a strategy with CSN-Mid Atlantic) to the type of temporary foreclosure envisioned by the FCC in the News Corp.-DIRECTV transaction.

60. As noted above, there are two important reasons why such foreclosure is more unlikely in the circumstances of the proposed transaction than in the News Corp.-DIRECTV deal: (1) DBS subscribers are more likely to have long-term contracts than cable customers (and thus, DBS is more likely to obtain subscribers from a cable provider if it withheld temporarily an RSN than a cable provider); and (2) DBS reaches virtually every household in the RSN footprint, while Comcast reaches a much smaller fraction of all TV households in the footprint (and thus, DBS is more able to recoup any losses from temporarily withholding an RSN). Thus, even with addition of Adelphia households and swaps with Time Warner, Comcast would still be short of being able to attract all the households that would switch from rivals as a result of withholding.

61. No commenter has examined this critical issue of the measurable impact on the incentives and ability of Comcast to temporarily (or otherwise) to withhold programming after the transaction. As a result, no commenter has any basis to conclude that the proposed transaction alters Comcast's incentives or ability to engage in a temporary foreclosure strategy.[46]

[45] See Table 1.

[46] In the News Corp.-DIRECTV transaction, the FCC appeared to ignore the potentially substantial regulatory and legal costs involved with engaging in a temporary foreclosure strategy. Those legal costs could be quite significant, which would make a temporary foreclosure strategy even more expensive.

iii. Price Changes

62. The final argument put forward by opponents is that the proposed transaction will allow Comcast to raise the fee that Comcast charges other MVPDs for its RSN programming. Here the argument is that the proposed transaction strengthens Comcast's bargaining position vis-à-vis its DBS competitors because it increases the share of those subscribers who would switch from DBS vendors in the event that the parties fail to reach an agreement on prices who would be captured by Comcast. Put another way, according to this theory, the transaction improves Comcast's bargaining position because it makes it less costly for Comcast to walk away from a deal. That is, the transaction alters the downside risks for Comcast, which enables it to force a higher affiliate fee.[47]

63. This argument does not square with the facts. Today, Comcast charges roughly the same affiliate fee for its RSN programming to direct competitors (EchoStar, DIRECTV, RCN, etc.) and to MVPDs that it does not compete with.[48] There are two plausible reasons why we observe such an outcome. The first reason is that the bargaining power story is incorrect; that is, even though the downside risk of Comcast walking away from a deal differs according to its subscriber share, this is not enough to alter the bargaining outcome. A second reason is that there is an existing regulatory constraint: compliance with program access rules requires that Comcast not discriminate in the price that it charges competing and non-competing MVPDs for its RSN

[47] Here the underlying theory is that of bargaining over the division of economic surplus from the transaction.

[48] We were provided the affiliate fees that Comcast charges all MVPDs with more than 25,000 subscribers in a RSN footprint. There were differences based on the location of an MVPD (*i.e.*, there was one price for, say, "inner market" subscribers and one price for "outer market" subscribers). But there were no significant differences based on whether the MVPD competes directly with Comcast or does not compete with Comcast.

programming.

64. Given the existing regulatory constraint, there is one other possibility for anticompetitive effect in the event of an increase in the subscriber base (through an acquisition or a swap): in particular, Comcast may decide to try to elevate the price of its RSN programming uniformly to all MVPDs. But such a strategy could be very costly. As Table 1 suggests, the areas covered by non-competing MVPDs comprise a significant share of RSN footprints.[49] This tends to constrain significantly Comcast's ability to impose a uniform price increase. Specifically, if Comcast attempted to raise the license fee, it will lose distribution on the systems of these non-competing MVPDs (cable distributors) which tends to limit the incentive to increase prices across the board. The logic here is simple: if Comcast could raise the price today to non-competing MVPDs, it would have already done so. Since the proposed transactions do not change the bargaining position of Comcast vis-à-vis non-competing MVPDs, Comcast has no ability to extract a higher price without the risk of losing distribution on those systems. In any case, commenters' economists have not provided any evidence that the change in incentives as a result of these transactions is significant enough (or not) to raise concerns about a uniform price rise. Our point is that the available evidence and the existing regulatory constraint makes it less likely that Comcast will have an incentive to increase prices by a uniform and significant amount.

[49] Comcast provides service to fewer than 40 percent of TV households in RSN footprints other than CSN-Philadelphia, and DBS averages about one-fifth of TV households in these RSN footprints: Specifically, DBS share in the footprints of CSN-Chicago is 17 percent; CSN-Mid Atlantic is 17 percent; and CSN-West is 23 percent. These figures suggest that other MVPDs provide service to a significant share of TV households in each RSN footprint.

V. Conclusions

65. We conclude that the proposed acquisition of the Adelphia assets by Comcast, and the transfer of assets between Comcast and Time Warner, is unlikely to reduce competition in the provision of MVPD services or the distribution of RSN programming. In fact, commenters have failed to demonstrate a basis for believing there would be a reduction in competition in any market. Therefore, we conclude that the proposed transactions are in the public interest and should be approved by the Commission.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on August 5, 2005

Janusz Ordover

I declare under penalty of perjury that the foregoing is true and correct.
Executed on August 5, 2005

Richard Higgins

H

EXHIBIT H

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CERTIFICATE OF SERVICE

I, Glenda V. Thompson, assistant to Mr. Harding of Fleischman and Walsh, L.L.P., hereby certify that copies of the foregoing "Reply" were served this 5th day of August, 2005, via first-class mail, postage prepaid, upon the following:

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